



CASE REPORT

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| 1. Complaint reference number | 213/04 |
| 2. Advertiser | Subaru Australia Pty Ltd |
| 3. Product | Vehicles |
| 4. Type of advertisement | TV |
| 5. Nature of complaint | FCAI - Other |
| 6. Date of determination | Tuesday, 14 September 2004 |
| 7. DETERMINATION | Dismissed |

DESCRIPTION OF THE ADVERTISEMENT

The material reviewed by the Board opens with a visual of different types of Subaru models being driven in different areas and over different terrains as the voiceover describes the awards the Subaru cars have won. One of the depictions is of a Subaru rally car in racing livery driving on a dirt track and through water and jumping into the air. The voiceover states "These cars have won the 2003 Australian and World Rally Car Championships." The Australian and World rally logos also appear as supers on the screen.

THE COMPLAINT

Comments which the complainant/s made included the following:

"I wish to register a complaint...of certain dangerous aspects, shown to the general public, presumably with your committee's approval. [An] advertisement is shown of a "SUBARU" sedan at great speed, leaving the ground over a hilly road, then finally speeding across an expanse of water."

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complaint/s included the following:

"... the vehicles in question are clearly rally cars filmed participating in off-road rally events. They are prominently marked with rally livery for the World and Australia Rally events. Combined with the fact that the vehicles are obviously in rally livery and driving off-road in a rally event, Subaru does not believe that any reasonable viewer could possibly form the view that the advertisement was depicting normal on-road activity."

"...the scenes that [the complainant] has complained about depict Subaru vehicles in unmistakable rally livery, participating in an off-road rally event. There is no basis for a conclusion that the depicted driving was in any way associated with normal on-road use of a vehicle. The voiceover, and the depiction of the two rally logos make it clear beyond any doubt that what was depicted was rallying activity."

THE DETERMINATION

The Advertising Standards Board ("Board") was required to determine whether the material before it was in breach of the Federal Chamber of Automotive Industries' Advertising for Motor Vehicles Voluntary Code of Practice which came into effect on 1 July 2004 (the "FCAI Code").

To come within the FCAI Code, the material being considered must be an "advertisement". The FCAI Code defines "advertisement" as follows:

“.....matter which is published or broadcast in all of Australia, or in a substantial section of Australia, for payment or other valuable consideration and which draws the attention of the public, or a segment of it, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organisation or line of conduct.”

The Board decided that the material in question was published or broadcast in all of Australia or in a substantial section of Australia for payment or other valuable consideration given that it was being broadcast on television in Australia.

The Board determined that the material draws the attention of the public or a segment of it to a “product” being a Subaru “in a manner calculated to promote.....that product”. Having concluded that the material was an “advertisement” as defined by the FCAI Code, the Board then needed to determine whether that advertisement was for a “motor vehicle”. “Motor vehicle” is defined in the FCAI Code as meaning:

“passenger vehicle; motorcycle; light commercial vehicle and off-road vehicle.”

The Board determined that the Subarus depicted were all “Motor vehicles” as defined in the FCAI Code.

The Board determined that the material before it was an “advertisement for a motor vehicle” and therefore that the FCAI Code applied.

The Board then analysed specific sections of the FCAI Code and their application to the advertisement. The Board identified that clauses 2(a), 2(b), 2(c) and 3 were relevant in the circumstances. The Board had to consider whether those clauses of the Code had been breached.

Before looking at whether clauses 2(a), 2(b) and 2(c) of the FCAI Code had been breached, the Board first considered whether clause 3 of the FCAI Code had been complied with. The Board determined that clause 3 of the FCAI Code was not a saving provision. Neither the express language of the clause nor the intention behind the FCAI Code allow clause 3 to operate as an exemption to a breach of any part of clause 2. The express language of clause 3 of the FCAI Code indicates that advertisers may make use of the scenes permitted under that clause “Without limiting the general application of clause 2”. As a result, clause 3 is intended to ensure advertisers can legitimately make use of the types of scenes permitted under clause 3 provided that the provisos in clause 3 are satisfied and the use of such material is consistent with the general application of clause 2 in the context of the activities permitted.

The Board noted that pursuant to clause 3 of the FCAI Code, advertisers are permitted to:

“make use of scenes of motor sport; simulated motor sport; and vehicle testing or proving in advertising, subject to the following:

Such scenes should be clearly identifiable as part of an organised motor sport activity, or testing or proving activity of a type for which a permit would normally be available in Australia.

Any racing or competing vehicles depicted in motor sport scenes should be in clearly identifiable racing livery.”

The Board first gave consideration to whether the advertisement in question made use of scenes of “motor sport” in accordance with clause 3 of the FCAI Code. “Motor Sport” is defined in the FCAI Code as meaning:

“racing, rallying, or other competitive activities involving motor vehicles of a type for which a permit would normally be available under the National Competition Rules of the Confederation of Australian Motor Sport, or other recognised organising body.”

The advertiser indicated in its response that the footage of the vehicles being complained about was footage from both the Australian and World Rally Car Championships. The advertiser informed the Board that Subaru contributes (together with other car manufacturers) a specific sum of money to a commercial TV network to film the events and in consideration of that payment, the commercial TV network provides those manufacturers with a licence to use such footage. The advertiser informed the Board that the footage in the advertisement was licensed material filmed at the Australian and World

Rally Car Championships. The advertiser also confirmed that a permit was obtained for the carrying out of these events.

The Board therefore formed the view that the driving practices depicted in the advertisement did involve rallying activities of a type for which a permit would normally be available under the CAMS rules and therefore the advertisement had made use of “motor sport” scenes as defined under the FCAI Code.

The Board was then required to consider whether the provisos in clauses 3(a) and (b) had been satisfied.

Clause 3(a) of the FCAI Code requires the use of the “motor sport” scene to be:

“clearly identifiable as part of an organised motor sport activity....of a type for which a permit would normally be available in Australia.”

The Board was of the view that the depictions involving rallying activity were clearly identifiable as such an activity as required under clause 3(a) of the FCAI Code, for the following reasons:

The voiceover described the fact that the Subarus depicted had won the 2003 Australian and World Rally Car Championship; and

The advertiser displayed the Australian and World Rally Car Championship award logos as the rallying activity depictions appeared on screen.

Based on the information provided by the advertiser, the Board was also able to conclude that such activity was of a type for which a permit under the CAMS rules was and would normally be available in Australia.

Clause 3(b) of the FCAI Code requires that in any use of a “motor sport” scene:

“any racing or competing vehicle depicted.....should be in clearly identifiable racing livery.”

The Board noted that the exterior of each Subaru depicted in the rallying activity scenes was completely and clearly adorned in racing livery.

For the above reasons, the Board formed the view that it would have been clear to the ordinary viewer that the activity being depicted was “clearly identifiable” as a rallying activity and therefore the advertisement did satisfy clause 3 of the FCAI Code.

The Board then had to consider the general application of clause 2. Having already determined that clauses 2(a), 2(b) and 2(c) were relevant in the circumstances, the Board first considered whether clause 2(a) of the FCAI Code had been breached.

In order to breach clause 2(a) of the FCAI Code, the driving practices depicted must be:

“unsafe driving, including reckless and menacing driving that would breach any Commonwealth law....if such driving were to occur on a road or road related area...”

Having determined that the driving practices depicted were a legitimate use of “motor sport” under clause 3 of the FCAI Code, the Board was required to consider whether the driving practices depicted were in breach of clauses 2(a), 2(b) and/or 2(c) in the context of such activities. The Board was not required to determine whether clauses 2(a), 2(b) and/or 2(c) had been breached in the context of whether the driving practices depicted would be illegal were they to occur on a road or road related area.

The Board formed the view that clause 2(a) had not been breached. Given that the driving practices depicted was actual footage taken at the Australian and World Rally Car Championships and permits had been obtained, the Board was of the opinion that the driving practices would not be illegal under Commonwealth, State and/or Territory law in the context of the rallying activities.

The Board then considered whether clause 2(b) of the FCAI Code had been breached. In order to breach clause 2(b), the driving practices must depict:

“people driving at speeds in excess of the speed limits in the relevant jurisdiction in Australia in which the advertisement is published or broadcast.”

The Board formed the view that clause 2(b) had not been breached. Given that the driving practices depicted, including the speed of the vehicles, was actual footage taken at the Australian and World Rally Car Championships and permits had been obtained, the Board was of the opinion that the speed limits in the relevant jurisdiction in Australia would not apply in the context of the rallying activities.

The Board then considered whether clause 2(c) of the FCAI Code had been breached. In order to breach clause 2(c), the driving practices depicted must:

“...if they were to take place on a road or road related area, breach any Commonwealth law....”

Having determined that the driving practices depicted in the advertisement were not in breach of clause 2(a) of the FCAI Code on the basis of their legality in the context of rallying activities, the Board subsequently determined that such driving practices would also not be in breach of clause 2(c) of the FCAI Code.

On the above basis, the Board confirmed its prima facie view and held that the material before it did not constitute an advertisement in breach of clauses 2(a), 2(b), 2(c) or 3 of the FCAI Code. The Board therefore dismissed the complaint.